STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEMETRIUS BUXTON,

Defendant-Appellant.

UNPUBLISHED
June 24, 2003

No. 237885
Kent Circuit Court
LC No. 00-007857-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LAMONT ROSS, a/k/a ROGER AARON JACKSON,

Defendant-Appellant.

No. 237886
LC No. 01-000297-FC

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendants were convicted of armed robbery, MCL 750.529; and possession of a firearm during the commission of a felony, MCL 750.227b. For their armed robbery convictions, defendant Ross received 9 to 50 years' imprisonment and defendant Buxton received 6 to 50 years' imprisonment. Both defendants were also sentenced to 2 years' imprisonment for their felony-firearm convictions. Defendants appeal as of right. We affirm in part and reverse in part.

This case arises out of an armed robbery that occurred at the New Yorker Men's Wear store ("New Yorker") located in the city of Grand Rapids. Mr. Hassan Ayad was a sales clerk at the New Yorker on March 14, 2000. According to Mr. Ayad, the New Yorker had just closed for the evening when defendant Ross approached him and asked him to re-open the store so that he could purchase a jacket. Because defendant Ross was a regular customer, Mr. Ayad acquiesced

and re-opened the store. However, when Mr. Ayad opened the door for defendant Ross two other men also entered the store. Mr. Ayad identified one of these individuals as defendant Buxton.

Mr. Ayad claimed that defendant Buxton hit him over the head with a gun and tied him up with a necktie. He further testified that defendant Buxton then put a coat over his head, threatened to shoot him, and took some of his personal belongings. During this time, Mr. Ayad claimed that he heard the two other men talking to each other and moving around the store. Mr. Ayad testified that it was clear to him that the men were engaged in robbing the store. The men ultimately left via the store's back door. Mr. Ayad explained that the back door was seldom used and that the men asked him for the key to unlock the door. The manager of a nearby store ultimately discovered Mr. Ayad tied up and bleeding from a head wound.

Both defendants testified at trial and denied taking part in the armed robbery. Defendant Buxton alleged that he only shopped at the New Yorker on occasion. However, he admitted that he had participated in "after-hours" sales at the store when Mr. Ayad contacted him. According to defendant Buxton, during these sales Mr. Ayad would open the store at night and sell the clothes for less than half-price. Defendant Buxton testified that Mr. Ayad would keep the cash and make everyone exit through the back door of the store. Nevertheless, defendant Buxton specifically denied visiting the New Yorker on the date of the robbery.

Defendant Ross similarly testified about the "after-hours" sales at the New Yorker. On the night of the robbery, defendant Ross admitted that he went to the New Yorker after being repeatedly paged by Mr. Ayad about the final "after-hours" sale. Defendant Ross claimed that he was only in the store for five minutes and that there were other people in the store when he left through the back door. Both defendants admitted that they had previously been convicted of providing the police with false information.

I. Right to Remain Silent

Defendant Buxton initially argues that he was denied a fair trial when the prosecution questioned him regarding his silence in violation of his Fifth Amendment right against self-incrimination. We disagree. Because defendant failed to object to the elicitation of this evidence below, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant waives his privilege against self-incrimination when he testifies at trial. *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). Consequently, a defendant's testimony may be impeached with evidence of both prearrest and postarrest silence without violating the Fifth Amendment. *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991). However, a defendant's decision to remain silent following *Miranda*[1] warnings is protected by the Fourteenth Amendment and may not be used for impeachment purposes or as substantive evidence. *Dixon, supra* at 406; *Alexander, supra* at 102. The underlying rationale

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

for this policy is that "it would be fundamentally unfair to advise a defendant of his right to remain silent and then use the fact of silence against him at trial." *People v McReavy*, 436 Mich 197, 218, n 21; 462 NW2d 1 (1990). The exception to this rule is when the defendant testifies that he cooperated with police or asserts that he made different statements to the police upon arrest. *Dixon, supra* at 406. In effect, "where a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on the *Miranda* warnings, the use of his silence is error." *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992).

Defendant Buxton's claim of error in the instant case arises out of the following exchange that occurred during his cross-examination:

> *Q.* Now when did you first find out that you were charged for an armed robbery that occurred at the New Yorker?
>
> *A.* When I first found out that I was charged? Uh—honestly –I don't remember.
>
> *Q.* Would [sic] you hear about it before you were arrested?
>
> * * *
>
> *A.* Yes
>
> * * *
>
> *Q.* Why didn't you—I mean didn't that concern you, that someone who may have been doing things after hours . . . why didn't you come forward and tell everybody about these after-hour deals that were going on?
>
> *A.* I mean – look where we sit at now. Who—whose [sic] they gonna believe?
>
> *Q.* But the first time you said anything about it is today on the stand, correct?
>
> *A.* Yes. Everybody—a lot of people—
>
> * * *
>
> *Q.* Did you know that—when you found out that you were charged with this robbery, that the—that the victim was Hassan Ayad?
>
> *A.* No, I did not.
>
> *Q.* But you knew . . . you were being charged with something that happened at the New Yorker?
>
> *A.* Yes.
>
> *Q.* And you never bothered to try to find anyone or to come forward to tell anyone that these after-hour deals were going on and that you were taking the wrap [sic] for something you didn't do?

A. No. Who would believe that, me or him?

A review of the record in this case fails to indicate when or even if defendant Buxton received his *Miranda* warnings. When conducting a plain error review, this Court looks for error that is "clear or obvious." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Absent information in the record concerning when defendant received his *Miranda* warnings, this Court cannot determine that plain error occurred. Moreover, to the extent that some of the prosecution's questions may have been open-ended regarding a time-frame, when considered in context it is apparent that their main focus concerned prearrest silence. Indeed, any reference to defendant Buxton's silence following *Miranda* warnings was innocuous at best. Consequently, defendant has failed to establish plain error affecting his substantial rights. *Carines, supra* at 763-764.

Defendant Buxton further asserts that the prosecution compounded this alleged error by similarly questioning codefendant Ross concerning the exercise of his right to remain silent. Improper testimony concerning a codefendant's assertion of a constitutional right *may* prejudice a defendant to the extent that reversal of his conviction is required. *People v Truong*, 218 Mich App 325, 335-336; 553 NW2d 692 (1996); *People v Gallon*, 121 Mich App 183, 191; 328 NW2d 615 (1982). The danger with such testimony is that an adverse inference may be made against the accused if the jury learns that a witness, intimately related to the criminal episode, chose to remain silent. In *Gallon, supra* at 191, this Court concluded that reversal was proper where the cases against the defendants were so inextricably intertwined that the jury could not convict one defendant and acquit the other.

The instant case is clearly distinguishable from *Gallon*. Defendants in this case were identified in separate line-ups and were arrested more than six months apart. Detective Erika Clark also indicated that defendants were identified as suspects through different investigations. Indeed, the only evidence linking defendants to the instant robbery is Mr. Ayad's testimony that he saw them on the night in question and remembered selling items to them on separate occasions in the past. While defendants were cousins, this information was only brought forth during the trial. On these facts, we do not find that the cases were so inextricably intertwined that defendant Buxton was inherently prejudiced by codefendant Ross' testimony.

Defendant Buxton also asserts that the challenged testimony was particularly damaging given the prosecution's statements during closing argument that defendant Buxton's presence at trial provided him an opportunity to tailor his testimony. In *Portuondo v Agard*, 529 US 61; 120 S Ct 1119; 146 L Ed 2d 47 (2000), the Supreme Court held that a prosecutor may properly make such an argument to a jury. Nevertheless, defendant contends that the circumstances of this case merit reversal. Specifically, defendant claims that the prosecution's questions commenting on his right to silence, coupled with allegations that he tailored his trial testimony, amount to error requiring reversal. However, defendant has failed to cite any legal authority to support this proposition. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997); *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994). In light of *Portuondo, supra*, we find no error requiring reversal.

Defendant Buxton further argues in his appellate brief that his counsel was ineffective for failing to object to the above line of questioning. However, defendant Buxton failed to include this issue in his statement of questions presented and we decline to consider this argument on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

II. Jury Instructions

Both defendants raise issues concerning the trial court's instructions to the jury. This Court generally reviews claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 593 (1996). However, because defendants failed to preserve their arguments below, our review is limited to plain error affecting their substantial rights. *Carines, supra* at 763-764.

It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

A. Defendant Buxton

Defendant Buxton claims that the trial court erred when it failed to sua sponte give a limiting instruction concerning prior bad acts evidence. We disagree.

On direct examination, defense counsel elicited testimony from defendant Buxton concerning his relationship with Mr. Ayad. In response to this line of questioning, defendant Buxton explained that he had purchased discounted merchandise from Mr. Ayad during illegal "after-hours" sales at the New Yorker. Defendant Buxton's counsel did not subsequently request a limiting instruction concerning this testimony. Absent a request for a limiting instruction or an objection to a court's failure to give such an instruction, a trial court is under no duty to sua sponte provide a limiting instruction. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Accordingly, we find no plain error. *Carines, supra* at 763-764.

We further disagree with defendant Buxton's claim that his counsel was ineffective for failing to request a limiting instruction. Defendant's failure to raise this issue before the trial court limits our review to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant Buxton's counsel presented the instant testimony in an attempt to attack Mr. Ayad's credibility and suggest that Mr. Ayad, rather than defendant Buxton, was responsible for the allegedly stolen goods. While in hindsight defense counsel's ultimate strategy may have proven unsuccessful, this does not mandate a conclusion that counsel rendered ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). After reviewing the record, we are not convinced that defendant Buxton has overcome the strong presumption that his trial counsel's failure to request a limiting instruction was sound trial strategy. *Carbin, supra* at 600. Indeed, it is reasonable that defendant Buxton's counsel made a tactical decision not to repeatedly highlight defendant Buxton's criminal indiscretions for the jury. This Court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).[2]

B. Defendant Ross

Defendant Ross argues that the trial court erred when it sua sponte provided an instruction to the jury on aiding and abetting. Defendant Ross contends that this instruction was improper because he was charged in the information as a principal and the prosecution never argued an aiding and abetting theory. A review of the record indicates that the trial court asked counsel if they had any comments concerning the instruction. Defense counsel for defendant Ross responded in the negative. A party waives review of an issue by intentionally relinquishing or abandoning a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Tate*, 244 Mich App 553, 558-559; 624 NW2d 524 (2001). It has long been held that "counsel may not harbor error as an appellate parachute." *Tate, supra* at 558. On this record, we find that any error was extinguished by defense counsel's approval of the instruction.[3]

Furthermore, we do not find that defendant Ross' counsel was constitutionally ineffective for failing to object. Jury instructions may only include those theories that are supported by the evidence. *Canales, supra* at 574; *People v Parks*, 57 Mich App 738, 743-745; 226 NW2d 710 (1975). In this case, there was evidence to support the trial court's decision to provide an instruction on aiding and abetting. According to the testimony, there were at least three individuals involved in the charged crimes. Mr. Ayad also testified that defendant Ross persuaded him to open the store after hours and that two other individuals closely followed him inside. Thereafter, Mr. Ayad heard the men talking to each other about what to take and stated that it sounded to him like they were working together. Further, defendant Ross' fingerprint was discovered on the back door that the thieves used during their escape. Because there was evidence to support the trial court's aiding and abetting instruction, defense counsel was not

[2] As an aside, it appears that this evidence was probably more harmful to the prosecution than to defendant Buxton. This is especially true given defendant Buxton's admission to the jury that he had pled guilty in the past to providing a police officer false information.

[3] We note that the Supreme Court in *People v Mann*, 395 Mich 472; 236 NW2d 509 (1975), held that a trial court could properly give a sua sponte instruction on aiding and abetting despite the fact that the theory had not been advanced during the trial.

ineffective for failing to object. Counsel is not required to advocate a meritless position. *Snider*, *supra* at 425.

III. Sufficiency of the Evidence

Defendant Ross further contends that there was insufficient evidence to sustain his convictions for armed robbery and felony-firearm. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). However, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

A. Armed Robbery

An armed robbery conviction requires the prosecution to establish the following beyond a reasonable doubt: (1) an assault; (2) a felonious taking of property from the victim's person or presence; (3) while the defendant is armed with a dangerous weapon or an article used in such a manner as to lead the victim to believe it is a dangerous weapon. MCL 750.529; *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). "A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); see also MCL 767.39. A defendant may be convicted as an aider and abettor if: (1) the defendant or some other person committed the charged crime; (2) the defendant assisted in the commission of the crime by performing acts or offering encouragement; and (3) the defendant either intended the commission of the crime or knew that the principal had such an intent when he offered aid and encouragement. *Izarraras-Placante*, *supra* at 495-496.

Defendant Ross alleges that there was insufficient evidence to indicate that he participated in or encouraged the armed robbery. Rather, defendant Ross claims that any testimony regarding his involvement was pure speculation because Mr. Ayad's face was covered. However, viewed in the light most favorable to the prosecution, the evidence shows that defendant Ross assisted in the armed robbery. Indeed, defendant Ross pressured Mr. Ayad into opening the store after closing time. As soon as defendant Ross gained access to the store, two other individuals followed him inside. Mr. Ayad claimed that one of these individuals hit him in the head with a gun, took his cell phone and several other items, and sat on top of him during the robbery. While Mr. Ayad's head was covered, he testified that he heard several individuals talking to each other during the robbery. Furthermore, defendant Ross' fingerprint was discovered on the back door that was used during the escape. There were also several phone calls to defendant Ross' pager from Mr. Ayad's cell phone during the time of the robbery. Mr. Ayad testified that he did not know defendant Ross' pager number or phone number and that he heard cell phones and pagers ringing during the robbery. On this record, we conclude that a rational trier of fact could find sufficient evidence to convict defendant Ross of armed robbery.

B. Felony-Firearm

Defendant Ross next asserts that there was insufficient evidence to support his felony-firearm conviction. There is no evidence on the record that defendant Ross actually possessed a gun during the robbery. Rather, defendant Ayad specifically stated that he only saw defendant Buxton with a gun. Thus, it appears that defendant Ross was convicted of felony-firearm under an aiding and abetting theory. However, to obtain a conviction for felony-firearm under an aiding and abetting theory "it must be established that the defendant procured, counseled [sic], aided, or abetted and so assisted *in obtaining* the proscribed possession, or *in retaining* such possession otherwise obtained." *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981) (emphasis added). After carefully reviewing the record, we are unable to find any evidence that defendant Ross aided and abetted his co-defendants in either obtaining the weapon or in retaining its possession. In light of *Johnson, supra*, we are compelled to vacate defendant Ross' conviction and sentence for felony-firearm.

IV. Prosecutorial Misconduct

Defendant Ross also maintains that the prosecution made several improper comments during the trial that amounted to prosecutorial misconduct and denied him a fair trial. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 763-764. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721.

Initially, defendant opines that the prosecution improperly vouched for the credibility of a witness and expressed her personal belief in the guilt of defendants. Case law provides that a prosecutor may not personally vouch for a witness' credibility or suggest that the government has special knowledge that a witness testified truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, where the jury is faced with a credibility question, the prosecutor is free to argue a witness' credibility from the evidence. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). "It is well-established that the prosecutor may comment upon the testimony and draw inferences from it and may argue that a witness, including the defendant, is not worthy of belief." *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). Further, the prosecution is not required to use the blandest possible terms to state its inferences or conclusions. *Launsburry*, *supra* at 361.

In support of his argument, defendant Ross cites a portion of the record where the prosecutor stated that Mr. Ayad was a credible witness. Viewing the prosecutor's remarks in context, however, it is apparent that the prosecutor was not personally vouching for Mr. Ayad's credibility. Rather, the record indicates that the prosecutor was arguing that the evidence would support Mr. Ayad's testimony and that the jury needed to focus on the evidence presented. See *Schutte, supra* at 722. Likewise, the prosecution's position that defendants were guilty was also based on the evidence presented at trial and not personal knowledge. *Buckey*, *supra* at 14-15.

Defendant Ross further opines that the prosecution impermissibly denigrated defendants and their defense counsel. Specifically, defendant Ross notes the prosecution's statements that

defendants were convicted liars and that their defense was pure fiction. The prosecution "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Further, a prosecutor may not personally attack defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, as previously noted, a prosecutor may argue from the facts that the defendant is not worthy of belief. *Launsburry*, *supra* at 361.

After reviewing the record, it is clear that defendant Ross has taken the prosecution's statements out of context. While the prosecution described the defense as fiction and noted that defendants were convicted liars, it based its arguments on the evidence presented at trial. See *id*. We note that both defendants admitted that they had been convicted in the past for giving the police false information. Accordingly, we find no error.

V. Sentencing

Defendant Ross ultimately challenges the factual bases underlying the trial court's scoring of offense variable (OV) 14. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court's scoring decision will be upheld on appeal if there is any supporting evidence in the record. *Id*.

Offense Variable 14 concerns the offender's role in the crime and permits an award of ten points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). We note that MCL 777.44(2)(b) provides that more than one individual may be labeled a leader when three or more people are involved. The trial court provided the following explanation for overruling defendant Ross' objection:

> The probation department concluded that the Defendant was a leader, I suppose because while the confederates were lying in wait, Mr. Ross is the one who took the lead in accosting Mr. Hassan Ayad and convincing him to open the store so he could go back in and buy a coat, and it was only after entry was gained that the two confederates emerged from their hiding and joined Mr. Ross in assaulting and robbing Mr. Ayad. The conclusion by the probation officer is this shows a leadership role by Mr. Ross, and I guess I'm hard pressed to dispute the point. I think he also, by a couple of years, at least, is older than Mr. Buxton, the Co-Defendant, and although that certainly would not be dispositive, it does tend to militate in favor of that conclusion. It seems to me that Mr. Ross clearly took a leadership role in this offense, and I think those points are properly scored.

The record in this case supports the trial court's conclusions. See *Hornsby*, *supra* at 468. Accordingly, resentencing is not required.

Affirmed in part and reversed in part.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood